

BARODYNAMICS, INC.

IBLA 93-348

Decided May 30, 1996

Appeal of a decision of the Colorado State Office, Bureau of Land Management, declaring unpatented mining claims CMC-18858, CMC-18860, CMC-18864, CMC-29255 through CMC-29265, CMC-105480, CMC-105482, CMC-105483, and CMC-178279 through CMC-178285 abandoned and void.

Reversed and remanded.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

An affidavit of labor was timely received by BLM pursuant to 43 CFR 3833.0-5(m) (1993) when it was received before Jan. 19, after it had been originally sent to BLM in an envelope postmarked prior to Dec. 31 of the preceding year.

APPEARANCES: John R. Henderson, Esq., Boulder, Colorado, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE BYRNES

Barodynamics, Inc., has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated April 13, 1993, declaring unpatented mining claims CMC-18858, CMC-18860, CMC-18864, CMC-29255 through CMC-29265, CMC-105480, CMC-105482, CMC-105483, and CMC-178279 through CMC-178285 abandoned and void for failure to file timely evidence of assessment work performed or notice of intention to hold the claims during the filing period ending December 30, 1992. 1/ A copy of appellant's evidence of

1/ BLM issued a second decision on Apr. 13, 1993, declaring unpatented mining claims CMC-18850 through CMC-18857, CMC-18859, CMC-18861 through CMC-18863, CMC-18865 through CMC-18874, CMC-105479, CMC-105481, and CMC-105484 abandoned and void for failure to file timely evidence of assessment work performed or notice of intention to hold the claims during the filing period ending Dec. 30, 1992. Appellant does not appear to challenge this second decision, since, in its appeal documents, appellant attaches the Appendix from BLM's decision declaring CMC-18858 et al. abandoned and void, and does not mention the Appendix from BLM's decision regarding CMC-18850 et al.

annual assessment work for the subject claims was received by BLM on January 8, 1993, in an envelope postmarked January 6, 1993.

In its statement of reasons on appeal, appellant argues that its filing was mailed to BLM, certified mail, return receipt requested, on December 23, 1992. Appellant has provided the Board with the original envelope in which its filing was mailed and original certified mail and return receipt requested receipts. Each of these items do, in fact, bear a December 23, 1992, postmark; however, the front of the envelope is stamped "Return to Sender" and "Refused Postage Due." Appellant supports its statement of reasons with a letter signed by Susan L. Baines, a clerk at the contract post office located in the Yucca Valley Drugstore. She states that she assisted in the preparation of appellant's mailing to BLM and corroborates appellant's assertion that the mailing took place on December 23, 1992, that the envelope bore a \$0.29 stamp when presented to her, and that she required an additional \$2 to cover the cost of certification and return receipt, which was paid by appellant's agent. She states that it was due either to her negligence in failing to affix the proper postage, or to the postage sticker becoming dislodged during transit, that the envelope was returned to appellant.

BLM does not dispute this sequence of events nor that the envelope postmarked December 23, 1992, contained appellant's affidavit of labor for the 1992 assessment year. We assume, therefore, that the affidavit was mailed in the fashion described by appellant. See Richard A. Willer, 101 IBLA 106 (1988); Elizabeth D. Anne, 66 IBLA 126 (1982).

Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1994), and Departmental regulation 43 CFR 3833.2-1 require the owner of an unpatented mining claim located on public land to file evidence of assessment work performed or a notice of intention to hold the mining claim with the proper BLM office prior to December 31 of each year following the year in which the claim is located. Such filing must be made within each calendar year, *i.e.*, on or after January 1 and on or before December 30. Ronald Willden, 97 IBLA 40 (1987); Robert C. LeFaivre, 95 IBLA 26 (1986). Further, the filing with BLM must be a copy of what was or will be recorded with the local recording office. 43 U.S.C. § 1744(a)(2) (1994); 43 CFR 3833.2-2, 2-3. Failure to file one of the two instruments within the prescribed time period conclusively constitutes an abandonment of the mining claim. 43 U.S.C. § 1744(c) (1994); 43 CFR 3833.4.

Pursuant to Departmental regulation 43 CFR 3833.0-5(m) (1993), a document received by BLM after December 30 of the calendar year for which the document is filed but prior to the following January 19 will be considered "timely filed," provided the envelope containing the document bears a clearly dated postmark affixed by the U.S. Postal Service on or before December 30 of the subject year. The importance of the postmark date was stated in the preamble to promulgation of 43 CFR 3833.0-5(m) as follows:

This means that the claimant must have completed all annual assessment work and mailed the document evidencing that work to the proper BLM office on or before December 30. Thus, the change in the regulations does not provide a "grace period" for late filing. Filing must still be made on or before December 30th. For the purposes of annual filing, the postmark will constitute evidence of filing. Such filing is conditioned upon subsequent receipt by the Bureau of Land Management. It should be noted that the envelope containing the required documents must be postmarked on or before the December 30 date in order for it to be accepted. [Emphasis added.]

47 FR 56300, 56302 (Dec. 15, 1982). It is well established that the regulation will not apply to situations where the envelope shows a postmark date later than December 30. See David H. Holt, 88 IBLA 36 (1985); J.W. Doyle, 87 IBLA 158 (1985). Thus, the statutory and regulatory filing requirements are not satisfied where a filing is received without a dated postmark falling within the appropriate filing period. Chemical Products Corp., 109 IBLA 357 (1989).

[1] As noted, appellant has submitted evidence sufficient to show that it did in fact transmit to BLM assessment work notices for the subject claims in an envelope postmarked December 23, 1992, but due to a post office error, the envelope was returned. It was then returned in an envelope not postmarked until January 6, 1993. Generally, the postmark is deemed to be the date of mailing, unless satisfactory corroborating evidence is presented to support appellant's contention that the mailing occurred at an earlier date. Bryan Cooley, 71 IBLA 299, 300 (1983); Daniel Ashley Jenks 36 IBLA 268, 270 (1978); David R. Smith, 33 IBLA 63, 66 (1977); Edward Malz, 33 IBLA 22, 24 (1977); Richard L. Triplett II, 32 IBLA 369, 370 (1977); David W. Gregg, 32 IBLA 293, 294; and cases cited. Typically, such satisfactory evidence involves a statement by a postal official explaining possible reasons why the postmark date is later than the actual date of mailing. Edward Malz, *supra*; Elliot Davis, 26 IBLA 91 (1976); Paul D. Beaird, Jr., 26 IBLA 79 (1976); A. Helander, 25 IBLA 54 (1976). In the case at hand, there is little doubt that the filing was properly deposited with the U.S. post office and that the proper postage was paid. It is also clear that the filing was received by BLM, but not accepted as a direct result of a post office error.

Given the admission on the part of the post office that its error was the direct cause of the return of appellant's timely postmarked envelope and that the filing was received within the grace period specified in the regulation, we believe that the proper course is to direct BLM to accept the filings as timely and to reinstate the above-referenced mining claims. See Joe H. Voza, 121 IBLA 370 (1991); Oro Fino Dredging Company, 94 IBLA 11 (1986).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and remanded to BLM for action consistent with this decision.

James L. Bymes
Chief Administrative Judge

I concur.

James F. Roberts
Acting Administrative Judge

